Filed 12/3/08 Sheehan v. Skerston CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LINDA SHEEHAN, Plaintiff and Respondent, v. PAULA SKERSTON, Defendant and Appellant.	G039592 (Super. Ct. No. 07HL04690) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Peter J. Polos, Judge. Affirmed.

Thomas H. Wolfsen for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Paula Skerston appeals from an injunction against harassment issued at the behest of Linda Sheehan. Skerston argues her conduct was constitutionally protected and served a legitimate purpose, and there was insufficient evidence of emotional distress to establish harassment. We disagree and affirm.

FACTS

Skerston is an attorney who, on her own initiative, investigates suspected animal abuse and provides the information she gathers to animal control officials and police departments.[1] She also represents plaintiffs in animal abuse litigation. Sheehan rescues cats. Skerston believed Sheehan was doing it for the money and then killing the cats.

In August 2006, Sheehan had applied for an earlier order against harassment based on Skerston's conduct between January and July 2006. On August 14, 2006, Skerston stipulated to an injunction that prohibited her from contacting Sheehan, and required her to remain at least 100 yards away from Sheehan, her residence, workplace, and vehicle. That order expired by its terms on January 29, 2007.

In July 2007, Skerston hired a private investigator to gather information in anticipation of personally suing Sheehan. The action was filed in mid-July 2007, but neither the complaint nor the date it was served appear in the record. It seems the suit concerned a donation Skerston had made to Sheehan's cat rescue efforts some years ago, and Skerston's belief Sheehan fraudulently held herself out as aiding animals when in fact she was killing them. No further details can be gleaned from the record.

On July 19, 2007, Skerston called Sheehan's apartment manager to ask for the latter's telephone number. When the manager replied she did not have that information, Skerston hung up, then called back a few minutes later to repeat the request. The manager recalled that when she demurred again, Skerston said "well my name is

[1] We consider the facts most favorable to the order below, under the rule that an order or judgment of a lower court is presumed correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133,)

Paula Skerston and I am going to sue her because she says that she does cat rescue and finds stray cats homes but she actually kills them." Skerston apparently succeeded in obtaining the number, because on July 19, 2007, she also left a voicemail message on Sheehan's home telephone advising of the upcoming suit.

On July 20, 2007, Sheehan's attorney wrote to Skerston, telling her "you are to have no further direct contact with Ms. Sheehan." Explaining he was aware of the call to the apartment manager and had listened to the voicemail message, the attorney stated "you may have Ms. Sheehan served with any legal [process] that is appropriate. You may not, however, contact her to discuss this matter, as she wishes to have no interaction with you."

In early August 2007, Skerston followed Sheehan as she drove to a friend's house. It is unclear whether Sheehan was aware of this at the time or only learned of it after the fact. Later in the month, Sheehan learned from her apartment manager that Skerston had visited the complex and spoken with the manager, who was showing an apartment to a prospective tenant. Skerston told the manager she was suing Sheehan and looking for information about the latter's cat rescue business. The manager asked Skerston to come back later. Skerston did return, but only to interview four of Sheehan's neighbors. She told the neighbors she was trying "to find out what [Sheehan] was doing with all these cats and kittens," confiding her suspicion "she was killing them all."

Skerston also called Sheehan twice during the month. Skerston had been contacted by producers for the "Judge Judy" and "Judge Joe Brown" television shows, who "wanted to put our case and story on national television." They proposed Skerston dismiss her civil action and the parties agree to arbitration on the show. Skerston testified "I wanted my small claims [case] on TV," so she left two messages for Sheehan, one about 30 seconds and the other of 45 seconds, explaining the offer and the conditions if they agreed to go on either show. Sheehan did not agree.

Skerston's small claims action against Sheehan was heard on September 28, 2007. During the hearing, Sheehan learned Skerston had peered into her vehicle in the apartment parking lot on two occasions. It was then Sheehan also learned of the private investigator. Sheehan won the case. Undaunted, Skerston wrote to Sheehan the following day.

In that letter, Skerston told Sheehan "you made statements in court about me that are defamatory" and "I intend to file a lawsuit against you for defamation." After laying out the offending statements, Skerston closed by saying "[i]f you do not take corrective action I will be forced to file a lawsuit against you."

Sheehan brought the instant request for an order to stop harassment on October 7, 2007. In a supporting declaration, and at a hearing on the application, she presented the evidence set out above. Sheehan also testified she had heard of "bizarre behavior" by Skerston in her animal rights work, going through people's trash, driving off with their trash bags, visiting their places of employment, and talking to coworkers. Sheehan further testified "[Skerston's] behavior has been very harassing and has caused me a lot of fear and anxiety. I'm afraid to leave my house to go to my car. To go to my job, to go to my friend's house. [¶] She did follow me to a friend's house. I'm constantly looking over my shoulder. My life has been completely changed. Very much in fear. Very much on edge. I can't concentrate at work."

The trial court entered a restraining order directing Skerston not to "harass, attack, strike, threaten, assault (sexually or otherwise), hit, follow, stalk, destroy personal property, keep under surveillance, or block [the]movements" of Sheehan. Skerston was ordered not to "contact (directly or indirectly), telephone, send messages, mail, or e-mail" to Sheehan, and she was directed to stay at least 100 yards away from Sheehan, her home, workplace and vehicle.

DISCUSSION

Skerston contends her activities in gathering information for the civil action against Sheehan were protected by the litigation privilege, so the injunction was unwarranted. But she overlooks unprivileged conduct that was properly enjoined.

One who has suffered harassment as defined by statute may seek a temporary restraining order and an injunction. (Code Civ. Proc., § 527.6, subd. (a).) "Harassment" is defined as "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and *that serves no legitimate purpose.* The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff." (Code Civ. Proc., § 527.6, subd. (b), italics added.) "Course of conduct" is also a defined term. It means "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose . . . . *Constitutionally protected activity is not included within the meaning of 'course of conduct.'*" (Code Civ. Proc., § 527.6, subd. (b)(3), italics added.)

The litigation privilege provides that a "publication or broadcast" is privileged if made in "any . . . judicial proceeding." (Civ. Code, § 47, subd. (b).) It applies only to communications that are made to achieve the objects of the litigation and have some logical relation to the action. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) Prelitigation communications also are privileged if they relate to litigation contemplated in good faith and under serious consideration. (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251.)

Some of Skerston's communications were protected by the litigation privilege, but not all of them. The messages about the "Judge Judy" and "Judge Joe Brown" television shows, and the letter threatening to sue Sheehan for defamation, did not further the objectives of the civil action and were beyond the litigation privilege.

Skerston was interested in the television shows for the publicity, not to further her claims against Sheehan. Skerston testified she called Sheehan about the opportunities because she "wanted to put our case and story on national television." The calls, in short, were not made to further Skerston's civil action, but rather to obtain publicity and turn it into a form of entertainment.

The calls might be viewed as an offer of settlement – dismiss the civil action in favor of voluntary arbitration (although Skerston's testimony suggests she was after publicity and entertainment, not the advantages of alternate dispute resolution), but while an offer of settlement is protected by the litigation privilege, the manner of making the offer in this case was not. Having been warned by Sheehan's attorney not to contact her, Skerston could easily have left the same messages with the attorney. When Skerston chose instead to call Sheehan, she went beyond inquiring about alternate dispute resolution, and beyond conduct that can be viewed as privileged. The harassing conduct was not the content of the messages, but the way they were delivered. In light of the prior injunction against harassment by Skerston, the direct warning that Skerston stop contacting Sheehan, and the alternative of communicating the putative offer of settlement to Sheehan's attorney, the calls to Sheehan were not protected by the litigation privilege.

Nor does the litigation privilege protect the letter threatening to sue Sheehan for defamation because of statements she made during trial of the civil action. The letter was written the day *after* the action ended with a defense judgment, so it cannot find protection as a communication made in a pending judicial action. Nor was the letter privileged as a prelitigation communication in Skerston's threatened defamation action. The litigation privilege "arises at the point in time where litigation is no longer a mere possibility, but has instead ripened into a proposed proceeding that is actually contemplated in good faith and under serious consideration as a means of obtaining access to the courts for the purpose of resolving the dispute." (*Edwards v. Centex Real*

Estate Corp. (1997) 53 Cal.App.4th 15, 39, italics omitted.) Here, there was no evidence Skerston was considering that action seriously and in good faith. (*Action Apartment Assn., Inc. v. City of Santa Monica, supra*, 41 Cal.4th 1232, 1251.) To the contrary, it may be fairly inferred Skerston was not acting in good faith, or seriously, in making the threat.

Statements made at trial are protected by the litigation privilege if they are made to achieve the objectives of the litigation and have some logical relation to it. (*Silberg v. Anderson, supra*, 50 Cal.3d at p. 212.) There was no evidence Sheehan's testimony was unrelated to her defense in the civil action, which would be necessary to show the trial statements were beyond the litigation privilege. Without showing at least a possibility Sheehan's statements were unprivileged, there is no evidence that Skerston – a lawyer – could have been acting in good faith when she wrote the threatening letter to Sheehan. So the defamation letter was not covered by the litigation privilege any more than the messages about the television shows.

Skerston asserts her conduct cannot amount to harassment because it served a legitimate purpose (Code Civ. Proc., § 527.6, subd. (b)), that is, investigating animal abuse. We cannot agree as to the television messages and the defamation letter. After Skerston was warned not to contact Sheehan by the latter's attorney, any legitimate purpose could have been accomplished by communications through the attorney. When Skerston persisted in contacting Sheehan personally, she stepped outside the bounds of any legitimate purpose that might have been a defense to an injunction against harassment.

Skerston also claims her conduct was protected under the anti-SLAPP statute. (Code Civ. Proc., § 425.16.) But the point was waived when not raised below. Skerston never made a special motion to strike in the trial court, and that failing cannot be bypassed by raising the issue for the first time in this court. Having declined to bring

the motion below, Skerston waived any argument the anti-SLAPP statute applies to the instant matter.

Equally wide of the mark is Skerston's reliance on *Smith v. Silvey* (1983) 149 Cal.App.3d 400. There, the court reversed an injunction that prohibited Silvey from contacting various government agencies with complaints over the operations of a mobile home park. It explained the park operator's irritation at the complaints did not justify the order, since Silvey was exercising his constitutional right of petition. The same cannot be said here. The television messages and defamation letter – bypassing Sheehan's lawyer and sent to her directly – do not amount to petitioning the government for redress of grievances.

Finally, Skerston contends there is insufficient evidence of emotional distress to support the injunction. Skerston makes two points – there was no evidence her conduct would have caused a reasonable person to suffer substantial emotional distress, and Sheehan was not to be believed when she testified she actually suffered substantial emotional distress. We disagree on both counts.

Direct evidence that a reasonable person would have suffered emotional distress is not required in a harassment case, where such harm may be inferred from the nature of the offending conduct. (*Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1110-1111.) Here, the evidence was sufficient to permit an inference that a reasonable person would have suffered substantial emotional distress as a result of Skerston's actions.

On the actual harm point, Skerston argues no medical or psychological evidence was offered, and she details a long list of things she did not do (yell, curse, or engage in verbal abuse, among other things) to show Sheehan did not suffer emotional distress. But that misses the point. Sheehan testified her life had been changed by Skerston's conduct to the point that she was "constantly looking over my shoulder" and lived "very much in fear . . . very much on edge," and she was unable to concentrate at

work. Credibility of witnesses is a matter for the trier of fact. In issuing the injunction, the trial judge impliedly found Sheehan believable, and we cannot second guess that call. Sheehan's testimony is sufficient evidence of actual, substantial emotional distress.

DISPOSITION

Since Skerston engaged in harassing conduct that was neither privileged nor served a legitimate purpose, and there is sufficient evidence of emotional harm, the order appealed from is affirmed. Sheehan not having filed a respondent's brief, there are no costs to be awarded.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.